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In the Supreme Court of the United States.

OCTOBER TERM, 1959

No. 206

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 440, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO,

Petitioners,

vs.

CISCO CONSTRUCTION CO., an Oregon corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. 71-81) is reported in 266 F. (2d) 365.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 13, 1959 (Pet. 81). The Petition for Writ of Certiorari was filed—served on Respondent—on July 13, 1959. The jurisdiction of this court was invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The decision of the court below is NOT in conflict with the decision of another court of appeals. It does NOT present a question of Federal law which has not been decided and which should be settled by the Supreme Court. It is NOT in conflict with applicable decisions of the Supreme Court. Indeed, it is based explicitly on four latest applicable decisions of the Supreme Court (Pet 73).

The first and principal question is a fourth tender of an issue argued, briefed and carefully considered by the National Labor Relations Board (Seattle District Council of Carpenters, 114 N.L.R.B. 27, 1955) and both the trial and appellate courts below and decided adversely to petitioners' contention on all three occasions. The second question, seemingly a make-weight issue, challenges the propriety of the reception and consideration (by the trial court, no jury) of three accounting exhibits.

1. The first question is whether or not a job site picket line accompanied and supplemented by admit-

tedly illegal coercive secondary action (Pet. 40); by "unlawful 'secondary boycott' activities" were so commingled that the "totality of effort" directed towards a single objective provides the basis for the recovery of damages resulting therefrom, pursuant to Sec. 303, Labor Management Relations Act.

2. There were received in evidence respondent's Exhibits 38, 40 and 41. These were offered to establish the additional costs incurred by respondent in the completion of the two contract jobs as the result of petitioners' illegal activity. Petitioners contend that these documents were not admissible under the shop book rule (28 U.S. C. Sec. 1732). Actually, Exhibit 40 was the only one of the three exhibits offered under this rule (R. 351). It was a record of receipts and disbursements on behalf of respondent maintained by the United States Fidelity and Guaranty Company at the time it was administering respondent's affairs. It was kept under the supervision of Mr. A. O. Prince, Superintendent of Claims, in the Seattle office of the company, and a part of the company's records (R. 169). Exhibit 38 consisted of a balance sheet and profit and loss statement purporting to show the financial condition of respondent for the thirteen-months' period from November 30, 1954 until December 31, 1955. It was prepared by respondent's certified public accountant and was based upon respondent's records and the data contained in Exhibit 40. Exhibit 41 was a "Job Cost Summary" purporting to be a summary of respondent's expenses at the Redmond and Youngs Lakes projects. This also included some data from Exhibit 40. Both Exhibits 38 and 41 were identified

and explained by Mr. Harry Skelton, certified public accountant, who prepared these exhibits. The original records were prior to trial made available to and examined by petitioners' accountants (R. 512) and were in court (R. 313) during the trial.

STATUTES INVOLVED

1. Labor Management Relations Act of 1947

Pertinent sections of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. Secs. 141-188, are as follows:

Unfair Labor Practices

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(A) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

Limitations

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *

Boycotts and Other Unlawful Combinations

"Sec. 303 (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

* * *

2. Shop Book Rule Act

Pertinent sections of the federal Shop Book Rule Act, 49 Stat. 1561, as amended, 28 U.S.C. Sec. 1732, are as follows:

"Sec. 1732: Record made in regular course of business: photographic copies

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular

course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrent, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section, includes business, profession, occupation, and calling of every kind."

* * *

STATEMENT OF FACTS

In view of the following admission in the petition (Pet. 40) an extended statement of fact is unnecessary:

> "After the job picket lines were established Cisco made arrangements to pick up materials at the premises of some of the subcontractors. When this project got under way, agents of the petitioners made various appeals to the employees of these subcontractors urging them not to load Cisco trucks with materials. . . . Petitioners conceded below and concede here that these activities constituted 'an attempt to induce . . . the employees (of the subcontractors) to engage in . . . a concerted refusal in the course of their employment to . . . handle or work on any . . . materials . . . (with an object in view of) forcing or requiring . . . (the subcontractors) 'to cease doing business with (the respondent)'."

The "various appeals" referred to in the quotation above were found by the National Labor Relations Board to include petitioners ". . . picketing of . . . (two subcontractors) which was conducted at least in part to

force those secondary employers to cease doing business with Cisco by inducing and encouraging their employees to engage in a strike or concerted refusal to work . . .": persuasion, instruction, orders and threats to respondent's subcontractors and their employees (*Seattle District of Council of Carpenters*, 114 N.L.R.B. 27) (1955) R. 34-48).

The Board found further:

"from these facts and the record as a whole make it plain that the operation of Cisco at Redmond and Youngs Lake on a non-union basis was a matter of concern to all of the respondents and that respondent Carpenters' activity (a job site picket line) against Cisco and the action taken by the other respondents whose manifest purpose was to implement and further the effectiveness of respondent Carpenters' activity (again the job site picket line) were all directed toward the same end, namely, to secure the unionization of Cisco's employees." (Material in parentheses added)

The court below found that:

"This 'secondary' activity supplemented a stationary picket line at the job site . . ." (Pet. 72)

That

"there was activity of business agents of the defendant on the secondary front with the subcontractors which was obviously credited by the trial court that shows a concert of action among the defendants to bring pressure on those who had no dispute with defendants to cause them to cease doing business with it."

That

"These activities away from the job site show the concert of all defendants that the acts were rather aggressive and calculated to cause others than Carpenters to cease doing business with Cisco." (Pet. 76)

The trial court and the National Labor Relations Board (*Seattle District Council of Carpenters*, 114 N.L.R.B. 27, 1955), likewise found and held that the various phases or activities of petitioners were not severable but were so comingled and supplemental to the picket line as to render the entire campaign of coercion and intimidation illegal.

ARGUMENT

The strike by a Union is a right which the law recognizes, so long as it is carried on legally and for legitimate purposes. The moment the purposes become illegal and in violation of the prohibitions of the law, the strike become illegal and it matters not where the picket line may be maintained. The court below, after remarking "still it would always appear that the purposes of the original picket line at a very early date acquired the secondary object as something very much in the forefront." went on to say

> "To us it seems that one of the purposes of the Taft-Hartley Act was to permit a union to picket and to strike without interruption so long as it played the game fair and 'according to the book' but the right is unfair if there is wholesale violence on the picket line (there was not here) or if the unions vigorously set out in a concerted effort to keep other subcontractors from doing business with the contractor." (Pet. 77, 78) [1]

[1] Any lingering doubt that "a purpose" of the picket line was to "encourage" employees of subcontractors to refuse to perform services for their employers in performing their contracts with respondent is completely dissipated by the occurrence of the latter part of 1954, when petitioners called a meeting of respondent's subcontractors and told them to break their contracts with respondent (R. 243, 273, 274), and the later meeting of March, 1955, between petitioners and respondent's vice president, when permission to permit subcontractors to perform was again refused (R. 271, 242).

This seems not only to be the law as established by the decisions reviewed by the court below, but certainly is the only wholesome and reasonable interpretation of the purpose of the law. In the instant case, as long as the picket line remained "as originally established" and without any additional conduct which evidenced a purpose and intent of coercing subcontractors through their employees, from doing business with the contractor, no court could hold the picket line illegal, but when the establishment of that picket line was "supplemented" immediately by sending pickets to subcontractors' premises, even when the contractors' trucks were not there, and by numerous acts of coercion of subcontractors' employees, which petitioner admits were violative of the statute, "it would be manifestly unrealistic" to consider any of these activities "in isolation rather than as part of a total pattern of conduct engaged in by the respondents in connection with this controversy." The N.L.R.B. specifically found that this campaign of coercion by petitioners "whose manifest purpose was to implement, and further the effectiveness of respondent Carpenters' activity" to-wit: its initial picket line "were all directed toward the same end," constituted an illegal boycott, which they were ordered to stop.

The decision of the trial court not only adopts and approves these findings of the Board, but clearly states that the picket line as initially established was legal until the further acts and conduct of petitioners demonstrated the illegal purpose of the picket line and rendered their whole campaign of coercion against subcontractors illegal.

In complete harmony with both the Board decision and the opinion of the trial court is the opinion of the court below. As indicated in the excerpt quoted above it recognized that "one of the purposes of the Taft-Hartley Act was to permit a union to picket and to strike without interruption so long as it played the game fair and 'according to the book'," and then points out that this right to strike or picket is not protected "if the union vigorously sets out in a concerted effort to keep other subcontractors from doing business with the contractor." (Pet. 77-78). It put the question succinctly as follows:

> "So the test is not merely: is there a picket line? but: what is the object and what is the whole situation?" (Pet 79)

N.L.R.B. v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943.

International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B., 341 U.S. 694, 71 S. Ct. 954.

N.L.R.B. v. International Rice Milling Co., Inc., 341 U.S. 665, 71 S. Ct. 961.

Local 74, United Brotherhood of Carpenters & Joiners of America v. N.L.R.B., 341 U.S. 707, 71 S. Ct. 966.

The above cases are the decisions of the Supreme Court upon which the court below rested its decision. It said:

> "To us the resolution of the problem mainly depends upon how one reads four successive cases of the Supreme Court in the October term, 1950 (citing the above). From our analysis of these cases we conclude that the defendants may be judged by

their total activity during a period of time provided the illegal activity is *not deminimus.*"

These decisions are still the law of the land. No later decision was cited in the petition nor has been found which compromises the validity or force of these decisions.

Petitioners concede (Pet. 49) that the *Denver* case and the *Electrical Workers* case establish the rule that the strike or picket line even at a job site which is established for the purpose of exercising pressure or coercion on employees of subcontractors or third parties, is illegal. They attempt to distinguish these cases on the ground that the strike and picket line was "illegal from the beginning." Clearly, if an illegal purpose will "infect" or "spoil" a strike or picket line from the beginning it can be "infected" or "spoiled" at a later time by the same illegal purpose. It makes little difference whether the poison is inserted into the goblet before the wine is poured in, or after. At the moment the two become comingled and the potion is "spoiled." At the time a strike or picket line is supplemented and comingled in a general campaign of illegal coercion it becomes "spoiled" and illegal.

In discussing the case of *United Brotherhood of Carpenters etc. v. N.L.R.B.*, supra, the court below makes this observation, after noting that the picket line in that case, as originally established, did not violate the law:

"The object of the totality of action resulted in the finding of an unfair labor practice on the part of the union. The statute was not effective until after the picketing began, but the original lawful action

was held to have become illegal after the Act. Some legitimate objectives did not save the activity from being a violation of law." (Pet. 79)[2].

After reviewing the above decisions by the Supreme Court the court below observes that they support

> "our conclusion that the totality of the effort may be considered and show that when one of the real objects becomes to reach the contractor through an innocent third part (by concerted action of course) then he who has suffered may recover." (Pet. 79)

Neither the National Labor Relations Board nor the District Court found or held that the initial picket line continued to be legal after it was coupled with acts and conduct of petitioners that were part of a well-cordi-

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[2] Typical of the strained subjective reasoning of petitioners appears in their discussion of the *Carpenters* case, supra (Pet. 52).

The strike at Watson was prior to August 22, 1947.

"On August 22, 1947, par. 8 (b)(4)(A) took effect.

"Watson promptly filed a charge with the National Labor Relations Board based on the continuance of the above strike by petitioners on and after August 22nd. The Regional Director issued a complaint. . . ."

To the contention that the strike was originally legal, and that nothing further had been done after August 22nd, the Supreme Court said:

"The answer turns on what actually took place on and after August 22nd. As to that the Board concluded:

"'Nor is it material . . . that the labor dispute had its origin before the effective date of the amended Act, for we are convinced that it was continued and prolonged after the effective date by the very same factors which originally created it and *for the same original objective*, which, as found above, Sec. 8 (b)(4)(A) declares unlawful." (Emphasis supplied)

The interpretation placed on this decision by the court below (Pet. 79) is sound and appropriate to the point under consideration.

nated "joint venture" campaign "whose manifest purpose was to implement and further the effectiveness of respondent Carpenters' activity" to-wit: its initial job site picket line and "were all directed toward the same end."

> "What the trial court did, says the court below, is to find that the job site picketing which was admittedly lawful when established became unlawful as a result of the secondary activities of the petitioner." (Pet. 41-42)

This is precisely the position taken by the Board and no careful and considered reading of the Board's finding and order will sustain any different interpretation.

In his closing argument Mr. Bassett, Chief Trial counsel of petitioners, made the following admissions (R. 34):

> "I am handing up to Your Honor the findings of the Examiner which were accepted by the Board and I think we both agree these findings were correct. (Tr. 2)."

And later:

> "To get back to my original statement whether we are right or wrong I am ready to be judged by what the Board said. The Board certainly investigated this case. (Tr 9, 10)."

* * * * *

One fact stands out above all others. As the result of petitioners' conduct and activities, *every one of respondent's subcontractors (with the exception of a small non-union electrician) defaulted on their contracts with respondent*, contracts that covered 75% of the work on these two vital, military installations.

After having carefully weighed all of the arguments here advanced by petitioner and after deliberate consideration of the records, the trial court found:

> "The subcontracts specified a total cost of approximately $600,000.00 to plaintiff for services and materials for the Redmond and Youngs Lake jobs. When plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, it was put to an expense therefor of at least $75,000.00 above the subcontract cost. The court finds plaintiff's damage in the amount just stated by reason of the unlawful and concerted activities of the defendant resulting in nonperformance of the subcontracts."

Admissibility of Exhibits 38, 40, 41

Petitioners' contention that Exhibits 38, 40 and 41 were admitted by the trial court under the Shop Book Rule is erroneous. Only Exhibit 40, which was a record of the United States Fidelity and Guaranty Company's receipts and disbursements in connection with respondent's contracts, was offered under the Shop Book Rule (R. 352) 28 U.S.C. Sec. 1732.

Exhibit 38, a balance sheet and profit and loss statement, prepared by respondent's certified public accountant from respondent's books of original entry, and Exhibit 40, and Exhibit 41, a "Job Cost Summary," also prepared by respondent's certified public accountant, from the same sources, were admitted on the basis of the testimony of their identification by the author. Petitioners' objections to these exhibits may be summarized in the following excerpts from the testimony:

"Mr. Vance: (Petitioners' then attorney) If your

Honor please, we object to all of these. I objected to 40 when it was offered on the grounds that it doesn't show anything. Mr. Prince testified that somebody in their office prepared it; that all they did was they had an invoice and they would pay it, and there is no proof here——

The Court: I thought Mr. Prince said he checked in each instance to see that the material or work, or whatever it was, was performed on the job.

Mr. Vance: (after further discussion)——We further object to the document on the grounds of competency. Its authenticity hasn't been properly established. Nobody was called here to testify who made any such record or entries, or anything.

Our principal objection is to the fact that it just doesn't prove anything.——

The Court: And your objection to the other two, 38 and 41, is predicated on the same basis insofar as 38 and 41 are founded on 40, is that the idea?

Mr. Vance: That is correct, your Honor.

The Court: What do you have to say, Mr. Brown?

Mr. Brown: Our point on this objection is that these exhibits—this Exhibit 40 according to the testimony of Mr. Prince, which I believe your Honor quoted corrected, that he did check . . . It was made under his general supervision . . .

"This is a shop record. This is the way that U. S. F. & G. kept its records. . . . this is the way the U. S. F. & G. kept records on that job. They have a right to check into it and see all of the records substantiating that document. They have been made available and will continue to be . . . It is a shop book, and as such it is entitled to be admitted subject to whatever weight the Court in view of all the testimony sees fit to accord it.

(Further argument.)

The Court: Well, that was a thought I had in mind about it, that it went to the weight and not the admissibility. I think that is right." (R. 350, 351, 352)

It appears from the testimony all of these records were in court and had been made available to petitioners. They had prepared their own studies from them and subjected respondent's accountant, Mr. Skelton, to a searching cross-examination on all of the details (R. 361-393, 433, 437).

The testimony of Mr. Albert O. Prince, Superintendent of Claims of U. S. F. & G. and under whose supervision Exhibit 40 was prepared and maintained, appears in a record, pages 169 to 172. It was on the basis of this testimony, direct and voir dire, that the court admitted Exhibit 40 under the Shop Book Rule. There would seem to be little question but what it complies fully with the provisions of 28 U.S.C. Sec. 1732, particularly in view of the following provisions in said statute:

> "All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker may be shown to affect its weight but such circumstances shall not affect its admissibility."

CONCLUSION

The decision of the court below is not in conflict with the decision of any other court of appeals. It raises no new or undecided question. It is not only in harmony with, but explicitly based upon, applicable decisions of the Supreme Court.

The petition should be denied.

Respectfully submitted.

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